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## OBJECTIVE

Court rules and case law require a party to take affirmative steps to preserve relevant or potentially relevant records when litigation has been filed or is reasonably anticipated or foreseeable. The consequences of a failure to preserve records varies depending on the circumstances but may include: regulatory fines and penalties; civil litigation consequences such as increased litigation costs, sanctions, fines, adverse inference instructions, default judgment and civil contempt; vicarious liability for responsible senior management; and criminal liability for organizations and individuals.

## I. GENERAL POLICY

This document sets forth the authority and process for initiating, implementing, monitoring, and releasing litigation holds. This policy applies to all relevant or potentially relevant records, regardless of form, in the possession or control of the Department of Licensing and Regulatory Affairs ("Department") when litigation against the Department, or an employee acting within the scope of employment has been filed or is reasonably anticipated or foreseeable. This policy also applies when litigation has been filed, or is reasonably anticipated or foreseeable to be filed, on behalf of the Department.


When a litigation hold notice is issued, this policy suspends any records retention policy that would otherwise authorize destruction, deletion or disposal of the records covered by the litigation hold.

## II. DEFINITIONS

**Affected Parties:** All parties to which a Litigation Hold Notice is addressed, including, but not limited to, employees (whether temporary, permanent, full time or part time) and their supervisor, agents, contractors, vendors, IT liaisons or the Department of Technology, Management and Budget (DTMB).

**Correspondence:** Includes but is not limited to: letters; telegrams; electronic mail; facsimiles; voicemail messages; inter- or intraoffice memoranda or communications; text messages; any other written or electronic communications regardless of form; notes and memoranda of meetings or oral communications; sound recordings and transcripts.


**Documents:** Any paper or other writing and any item of graphic materials, however recorded or reproduced, including all drafts, copies or other preliminary material which

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are different from the executed or final document, regardless of whether designated "confidential", "privileged", or otherwise restricted, wherever located, whether an original or a copy, including but not limited to agreements, contracts, financial statements, invoices, minutes, worksheets, work papers, summaries and any other written records or recordings of any conferences, meetings, visits, interviews or telephone conversations, financial and statistical data, analyses, surveys, transcripts of testimony, statements, interviews, affidavits, press releases, memoranda, drafts, memo pads, notes, indices, tabulations, graphs, reports, papers, records, inter-office communications, electronic data processing charts, tapes, print-outs, papers or other recordings, tables, compilations, catalogs, telegrams, letters, photographs, diaries, calendars, drawings, data reports, printed matter, correspondence, communications received and/or sent, books, brochures, advertisements, circulars, mailings and publications; and any copy containing thereon or having attached thereto any alterations, notes, comments, or other material shall be deemed a separate document from the original or any other copy not containing such materials within the foregoing definitions, regardless who it was created by.

**Electronically Stored Information (ESI):** Computer data or electronic recorded media of any kind that is stored in a digital medium from which it can be retrieved and examined. ESI may include, but is not limited to, information and/or documentation stored via various software programs such as: e-mail, Outlook, Word, Excel, Access, Publisher, PowerPoint, Adobe Acrobat, web pages, metadata, or any other software or electronic communication programs (including telephonic voicemail, voice messaging, text messaging, social media, etc.) or databases. ESI may be loaded on network servers, BlackBerrys, PDAs, flash drives, CDs, DVDs, floppy disks, work computers, cell phones, laptops, electronic notebooks, or any other electronic device used to do or store Department work (including any personal devices used off-site, at home or elsewhere, for work related purposes), regardless who it was created by.

**Litigation to which the Department is a party:** This policy applies when litigation is filed or is reasonably anticipated or foreseeable, and the Department, or one or more Department employees acting within the scope of employment, is a party. Hereafter, references in this policy to "litigation to which Department is a party" shall include litigation in which a Department employee, acting within the scope of employment, is a party.

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**Litigation Hold Notice:** Written notification, and any changes or amendments thereto, that litigation has been filed or is reasonably anticipated or foreseeable, and that requires the recipients to preserve Potential Evidence in their possession or control.

**Potential Evidence:** Any Record that may reasonably be expected to be requested in discovery or used in or related to litigation to which the Department is or may be reasonably anticipated or foreseen to become a party.

**Records:** Includes Documents, Correspondence and ESI. Records also includes work related Documents and Correspondence kept off-site, at home or elsewhere (including any personal devices) for work related purposes.

### III. PROCEDURES


#### A. RELATION TO RECORDS RETENTION POLICY.

Upon receipt of a Litigation Hold Notice, or when litigation is otherwise reasonably anticipated or foreseen, Affected Parties shall immediately suspend destruction, deletion, or disposal of Records that are Potential Evidence. This policy supersedes any provision of a records retention policy that would otherwise authorize destruction, deletion or disposal of such Potential Evidence.

In accordance with this Policy, and when litigation has been filed, the Litigation Coordinator, in consultation with the Department of Attorney General (AG), shall send written notice to DTMB to suspend destruction, deletion or disposal of electronic records in DTMB's control that are Potential Evidence.

#### B. TRIGGER EVENTS AND DUTY TO PRESERVE.

Employees have a duty to preserve Potential Evidence when litigation to which the Department is a party is initiated or is reasonably anticipated or foreseeable. Employees must immediately conserve Potential Evidence in such circumstances and suspend deletion, destruction, purging, overwriting or disposal even if a litigation hold has not been issued.

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**1. Duty to Preserve Evidence whether or not a Litigation Hold Notice has been issued.**

Employees have a duty to preserve Potential Evidence when litigation to which the Department is a party is initiated, or is reasonably anticipated or foreseeable, even if a litigation hold is not issued.

**2. When Litigation is initiated against the Department.**

Litigation is initiated against the Department when a complaint or petition is filed with the court and served on the Department.


**3. When Litigation is reasonably anticipated or foreseeable against the Department.**

The following is a non-exhaustive list of events that may indicate that litigation is reasonably anticipated or foreseeable against the Department:

- a) Receiving a document preservation request or notice letter from an adverse party or legal counsel;
- b) Receipt of a communication threatening litigation;
- c) Notice of an administrative claim or complaint;
- d) A complaint was made to an external or internal investigatory agency or unit;
- e) Similar past experience or circumstances resulted in known and significant litigation;
- f) Violation of a statutory or regulatory obligation;
- g) Receipt of a cease and desist letter;
- h) A Department employee receives information of anticipated litigation;
- i) Events occurred that resulted in known and significant injury;
- j) Receipt or anticipation of receipt of a subpoena;
- k) Government audit or investigation; or
- l) Press or media reports suggest litigation is likely.
- m) Receipt of a Freedom of Information Act (FOIA) request.

**4. When litigation is initiated or reasonably anticipated or foreseeable by the Department against another party.**

Litigation is initiated by the Department when a complaint or petition is filed with a court and served on the opposing party by the Department or the Department of Attorney General on the Department's behalf. In addition, the following is a non-exhaustive list of events that may indicate that litigation is reasonably anticipated

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or foreseeable by the Department against another party:

- a) When the litigation is authorized by the Director or other authorized party;
- b) When a formal demand mentioning litigation is sent;
- c) Sending a documentation preservation letter;
- d) A time frame and strategy for litigation is discussed or established;
- e) Similar past experience or circumstances resulted in known and significant litigation;
- f) Events occurred that resulted in known and significant injury;
- g) There have been serious internal management discussions regarding potential litigation; or,
- h) When an examination of records is made to determine whether a claim or litigation shall be initiated.

### **C. DUTY TO NOTIFY THE LITIGATION COORDINATOR.**

Any employee who becomes aware of litigation to which the Department is a party, or is reasonably anticipated or foreseeable, shall immediately notify his/her immediate supervisor.

That supervisor shall immediately notify the Litigation Coordinator in writing.


### **D. DECISION TO INITIATE LITIGATION HOLD NOTICE AND IMPLEMENTATION.**

The Litigation Coordinator, or the attorney handling the matter in consultation with the Litigation Coordinator, shall make a good faith and reasonable written evaluation of the relevant facts and circumstances, as they are known at the time, to determine whether to initiate a Litigation Hold Notice.<sup>1</sup> This determination should also address the scope of

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<sup>1</sup> Determining if a Litigation Hold Notice is required and, if one is required, the scope of the Litigation Hold Notice, requires consideration of many different factors. Depending on the nature of the litigation, factors that might be pertinent to consider could include:

- The nature and specificity of the complaint or threat;
- The party making the claim;
- The position of the party making the claim;
- The business relationship between the accused and accusing parties;
- Whether the threat is direct, implied or inferred;
- Whether the party making the claim is known to be aggressive or litigious;
- Whether a party who could assert a claim is aware of the claim;
- The strength, scope or value of a potential claim;
- The likelihood that data relating to the claim will be lost or destroyed;
- The significance of the data to the known or reasonably anticipated issues;

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the hold, including the identification of Affected Parties and the types of Records that would be subject to the hold.<sup>2</sup> The Litigation Coordinator may consult with the relevant bureau/division staff to develop a better understanding of the issues raised in the litigation (or potential litigation) and to determine the appropriate scope for a Litigation Hold Notice. Later facts or information may require the Litigation Coordinator to reevaluate/amend such determinations.

The Litigation Coordinator, or the attorney handling the matter in consultation with the Litigation Coordinator, may determine that a written preservation plan is needed, for instance, when the litigation or reasonably anticipated or foreseeable litigation will encompass: a large quantity of records; where control over potential evidence resides in multiple locations throughout the Department; or which focuses on the Department's management of records, such as public records litigation.


In some cases, a Litigation Hold Notice is an appropriate response to preserve records for litigation. In other cases, a detailed preservation plan with DTMB support to suspend auto-deletion policies may be the better course. This determination, concerning the scope of the Department's preservation efforts, should be made in consultation with the AG and consider the needs of the case and the importance of the issues at stake to ensure that the Department's preservation efforts are an appropriate and proportionate response.

A written preservation plan may include, but not be limited to, the following information: list of the Affected Parties and their contact information; the types of Records and/or ESI to be preserved; when the Litigation Hold Notice(s), any amendments, and any

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- Whether the Department has learned of similar claims;
  - The experience of the industry;
  - Whether the records are being retained for some other reason; and
  - Press and industry coverage of the issue either directly pertaining to the Department, or of complaints brought against someone similarly situated in the industry.

The preceding list of factors is not exhaustive; they and other considerations must be weighed reasonably and in good faith in the context of what steps are reasonable and practicable as well as the scope and burden of an anticipated litigation hold. The Sedona Conference Commentary on Legal Holds, p. 9 (August 2007).

<sup>2</sup> In determining the scope of information that should be preserved, the nature of the issues raised in the matter, experience in similar circumstances and the accessibility of the information are factors that may be considered. . . Organizations should be cautious in determining whether to preserve inaccessible data; the Federal Rules Committee has stated that, "[a] party's identification of the sources of ESI as not reasonably accessible does not relieve the party of its common-law or statutory duty to preserve evidence." (quoting Fed. R. Civ. P. 26(b)(2)(B)(2006 Committee Note). Id. at pp.13-14.

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Preservation Questionnaire was/were sent; the time and response of the Affected Parties; the date(s) DTMB was notified to suspend destruction of Records and the scope of the records that DTMB was notified to suspend destruction; and the time and nature of follow-up contacts with the Affected Parties, including notes from any interviews conducted. Additional information as deemed appropriate by the Litigation Coordinator may be included in the written preservation plan.

Examples of preservation methods may include, but not be limited to:

- a) For ESI - suspension of auto-delete program(s); securing or imaging a hard-drive; securing and preserving a backup tape or backup media; and/or sequestering or archiving information/records.
- b) For paper records - making photocopies, sequestering original paper records to protect from loss, destruction or alteration; and/or storage at the contracted Department's off-site facility approved by the Secretary of State for the storage of Records.
- c) Any instruction contained in the Litigation Hold Notice.


Whenever possible, Potential Evidence shall be maintained in its native format.

## **E. THE LITIGATION COORDINATOR'S DUTIES**

The Litigation Coordinator shall:

- a) Advise whether litigation to which the Department may be a party is reasonably anticipated or foreseeable;
- b) Determine a response consistent with this Policy when litigation is initiated or is reasonably anticipated or foreseeable;
- c) Understand where and how ESI is stored within Department;
- d) Direct that retention schedules be suspended so as to preserve Records and other Potential Evidence as provided in this Policy;
- e) Coordinate consistent preservation and production practices for all litigations;
- f) Identify Affected Parties reasonably expected to have Potential Evidence and to whom to send a Litigation Hold Notice;
- g) Issue, confirm receipt of, and take appropriate follow-up action concerning Litigation Hold Notices;
- h) Identify the need to engage internal IT personnel or DTMB to preserve existing ESI and ESI created after the Litigation Hold Notice is issued;
- i) Develop written preservation plans, if and when deemed appropriate;



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- j) Work with Department IT personnel to determine the accessibility of various ESI forms, and the cost and feasibility of accessing and/or preserving such data for litigation or potential litigation;
- k) Help individuals comply with the Legal Hold Notice;
- l) Ensure appropriate follow-up for all preservation inquiries; and
- m) Such other actions deemed advisable by the Litigation Coordinator.

The Litigation Coordinator may delegate any duty under this Policy to his or her designee(s), including but not limited to the formation of a Litigation Response Team to coordinate efforts to preserve Potential Evidence.

#### **F. ISSUANCE OF A LITIGATION HOLD NOTICE.**


Upon determination a Litigation Hold Notice needs to be issued, the Litigation Coordinator shall notify the Affected Parties in writing that a litigation hold has been initiated. See Exhibit 1 for an example of a Litigation Hold Notice - THIS IS ONLY AN EXAMPLE AND THE LITIGATION HOLD NOTICE MUST ALWAYS BE ADAPTED TO THE SPECIFIC FACTS AND UPDATED WITH CURRENT CASE LAW.

Litigation Hold Notice shall inform the Affected Parties of their obligation to identify and immediately preserve all Potential Evidence that may be relevant to the litigation. The Litigation Hold Notice shall ask the recipient to confirm receipt and complete the Preservation Questionnaire within ten (10) calendar days (or sooner if the Litigation Hold Notice directs a shorter time period).

The Litigation Coordinator shall meet with the Affected Parties (if it is not possible to meet, alternative communication shall occur), and any other Affected Party identified in a subsequent supplementation to the initial Litigation Hold Notice, to help the Affected Party:

- (1) understand the litigation hold and his/her/its obligations to preserve Potential Evidence;
- (2) locate, ascertain, and retain all reasonably identifiable Potential Evidence in the Affected Party's possession or control;
- (3) by notifying DTMB to suspend destruction of Records, if applicable;
- (4) take appropriate steps to preserve Potential Evidence until advised it is no longer necessary to do so; and
- (5) understand the need to preserve additional Potential Evidence created or discovered after the litigation hold is issued and how to handle such Potential



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Evidence.

#### **G. RESPONSIBILITY OF SUPERVISOR.**

A Litigation Hold Notice addressed to a supervisor requires the supervisor to comply with the Litigation Hold Notice, forward such notice to appropriate staff and instruct such staff to comply with the Litigation Hold Notice. The supervisor shall be responsible for the employees' compliance with the Litigation Hold Notice and shall complete the Preservation Questionnaire.

#### **H. PERIODIC REVIEW AND MAINTENANCE OF LITIGATION HOLD NOTICES.**

At least quarterly or more frequently if, the Litigation Coordinator deems warranted, the Litigation Coordinator shall review existing Litigation Hold Notices to (1) determine the need to maintain the litigation hold on each of the Affected Parties; (2) remind the Affected Parties in writing of their continuing obligations under the litigation hold (including any changes); and (3) require Affected Parties to complete compliance certifications.


#### **I. REMOVAL OF LITIGATION HOLD.**

The Litigation Coordinator, or the attorney handling the matter in consultation with the Litigation Coordinator, shall determine and communicate in writing to Affected Parties when a Litigation Hold Notice is lifted and Potential Evidence no longer requires preservation. A Litigation Hold Notice may only be lifted if the litigation is no longer pending (including any appeals or potential appeals) or if litigation is no longer reasonably anticipated or foreseen. Before communicating to the Affected Parties that the litigation hold is lifted, the Litigation Coordinator shall make sure the Potential Evidence is not subject to other litigation holds. The lifting of a Litigation Hold Notice shall revive normal document retention policies.

If, at any time, an Affected Party under a litigation hold or the Affected Party's supervisor and/or bureau director receive notice that a Litigation Hold Notice may be lifted from another person other than the Litigation Coordinator, the Affected Party or his/her/its supervisor shall contact the Litigation Coordinator before any Potential Evidence is destroyed.

#### **J. DEPARTING EMPLOYEES.**

All departing employees in receipt of a Litigation Hold Notice are under an obligation to inform the Litigation Coordinator and the employee's supervisor about any impending

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departure from the Department in order that the Department can arrange for preservation of Potential Evidence. DO NOT send any computer or electronic equipment to DTMB or any other location without prior authorization from the Litigation Coordinator. The supervisor of a departing employee in receipt of a Litigation Hold Notice shall also notify the Litigation Coordinator and IT Liaison when completing the exit checklist. The supervisor shall take responsibility of any and all Potential Evidence under the control of the separated employee until further notice by the Litigation Coordinator.

#### **K. VIOLATIONS.**

Violations of this policy and procedures may be subject to disciplinary action up to and including dismissal.


#### **L. FURTHER INFORMATION**

**Litigation Coordinator:**

#### **M. ADDENDUMS**

**(A) Example Litigation Hold Notice**

**(B) Preservation Questionnaire**

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#### **Exhibit 1**

**NOTE: THIS IS ONLY AN EXAMPLE AND THE LITIGATION HOLD NOTICE MUST ALWAYS BE ADAPTED TO THE SPECIFIC FACTS AND UPDATED WITH CURRENT CASE LAW.**

**To:**

**From:**

**Date:**

**Re: Litigation Hold**

Please be advised that the Department of Licensing and Regulatory Affairs (LARA) has received a notice in connection with a claim or potential lawsuit tentatively captioned as: [ ] (the "Litigation").


The Litigation arises from allegations by [ ] against LARA and certain named and unnamed State employees. LARA is required to take steps to retain and preserve documents and other information relating to the Litigation. This Memorandum describes the steps you should take to preserve potentially relevant evidence.

If you have any questions or concerns about the requirements set forth below, please direct them to [ ] as soon as practicable.

#### **FORM OF DOCUMENTS TO PRESERVE:**

LARA and its employees have a duty to preserve Potential Evidence. This duty includes preserving both paper records and electronic records. Employees with control of paper or electronic evidence should be notified of the Litigation and instructed to take extra care in preserving documents relevant to the issues involved in the Litigation.

Electronic information, such as emails and voicemails, are often deleted in the regular course of the operation of information systems. A failure to preserve evidence (both records and electronic information, including a failure to preserve metadata - data about when files are created, edited, saved, etc.), may be punishable by sanctions imposed by the [ ] Court. The consequences of a failure to preserve will vary depending on the circumstances, but may include: regulatory fines and penalties; civil litigation consequences such as increased litigation costs, fines, adverse inference instructions, default judgment and civil contempt; vicarious liability for responsible senior management; and criminal liability for organizations and individuals.

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Because the Litigation relates to events that occurred recently and in the past, relevant information may be inadvertently deleted unless precautions are immediately taken to preserve and protect all relevant information.

In addition, if you or your employees store paper or electronic information with outside vendors, those vendors should be identified and informed of their preservation obligations as well.

This obligation to preserve records applies to documents of every kind, whether in hard copy or electronic form, including e-mails, voicemail, instant messaging, letters, memoranda, notes, drawings, designs, calendars, correspondence or communications of any kind, and applies even where retention would otherwise not be required by normal document retention policies and practices.

This litigation hold shall also apply to any records retained off-site that may be subject to an automatic records retention/records destruction policy. Any such records retention/records destruction policy shall be suspended as to the documents/subject matter referenced herein until further notice.


#### TIME PERIOD OF DOCUMENTS TO PRESERVE:

The documents that should be preserved (described below) are those that were created on or after [ ] to the date hereof, or that refer to events that occurred from that date to the present [and/or or going forward] relative to: [ ]

#### SUBJECTS OF DOCUMENTS TO PRESERVE:

Whenever any lawsuit is filed or reasonably anticipated, the parties are generally required to preserve documents related to the claims and defenses at issue in the lawsuit. At this early stage of the case, it is difficult to foresee exactly which issues may become relevant to the claims and defense of this case. Therefore, until further notice, all documents in any way related to the litigation should be preserved regardless of how inconsequential or minor the documents or information may seem.

If you are uncertain as to whether to retain a document or other information, please err on the side of preservation at this time. You should direct specific questions to the [ ].

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## HOW TO PRESERVE RECORDS:

### *Paper Documents:*

For all paper documents and files subject to this litigation hold that are maintained in filing cabinets or the like, and that will continue to be used from time to time in the ordinary course of business you should affix to the file cabinet or container the following note: *"Contents subject to { } litigation hold. Make and use copies only. Do not remove this label. Do not remove originals except to copy and return."*


All other paper documents subject to this litigation hold that can be segregated from routinely used business files should be segregated and stored in separate boxes or files. The custodian of such records should affix a note with his/her name, the date, and the following: *"Contents subject to litigation hold. Do not remove this label. Make and use copies only. Do not remove originals except to copy and return."*

Once you have identified and labeled all filing cabinets, boxes, files or other storage areas that contain documents or information, please provide a list within ten (10) calendar days to [ ] identifying (1) your name; (2) the date on which the documents or information were identified and segregated; and (3) the location of the documents or information; and (4) a general description of the documents or information.

### *Electronic Documents:*

Any electronic documents that may relate to this matter should be preserved. Such documents may be maintained on shared network files (such as local office file and print servers), computer hard-drives, DVDs, CD-ROMs, floppy disks, laptop computers, handheld or pocket PCs or tablets (e.g., iPads, Palm Pilots), and/or Blackberry devices. In addition, electronic documents located on an assistant's computer and/or client-related networks should be maintained.

Upon receipt of this notice, you should restore all responsive e-mail that may be in the "Trash" of your electronic mailbox and begin saving all "Sent" e-mail that is responsive, if your practice is not to save "Sent" e-mail. Additionally, when identifying e-mail subject to this notice, please make sure that you review all messages in the "Inbox," "Drafts," "Sent," "Archive," "Trash," and other such categorized messages.

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If you have any questions about Electronic Documents and/or how to preserve them, please contact IT at [ ].

Once you have identified all the Electronic Documents, please provide a list within ten (10) calendar days to [ ] identifying (1) your name; (2) the date on which the Electronic Documents were identified; (3) the location of the electronic documents or information; and (4) a general description of the electronic documents or information.

You must respond to this communication by completing the attached Preservation Questionnaire.

In summary, please take all steps necessary, including instructing other employees under your supervision, to save all documents in the State's possession, custody or control that relate in any way to the Litigation. Please take the time to review where you might have any such material (including your desk, personal computer, laptop computer, cell phone, file cabinets, etc., including any such material kept off-site, at home or elsewhere, including on personal electronic devices) so as to ensure that no such material is accidentally deleted, discarded, altered or destroyed. Also, please determine whom under your supervision you should coordinate with to ensure that all appropriate persons have been notified of this directive. This information should be included on the Preservation Questionnaire.

### **Departing Employees**

All departing employees in receipt of this Litigation Hold Notice are under an obligation to inform [ ], and the employee's supervisor, about any impending departure from the Department in order that the Department can arrange for preservation of Potential Evidence. DO NOT send any computer or electronic equipment to DTMB or any other location without prior authorization from [ ]. The Supervisor of an employee in receipt of a Litigation Hold Notice shall also notify their IT liaison when completing the exit checklist. The Supervisor shall take responsibility of any and all Potential Evidence under the control of the separated employee until further notice by the [ ].

### **Failure to Comply**

Violations of this Litigation Hold notice may be subject to disciplinary action up to and including dismissal.